Case Western Reserve Law Review

Volume 35 | Issue 1

1984

Rethinking Regulation of Independent Expenditures by PACs

Wilbur C. Leatherberry

RETHINKING REGULATION OF INDEPENDENT EXPENDITURES BY PACS

*Wilbur C. Leatherberry**

Campaign finance reform proposals are as common as election-year promises. Independent spending by political action committees (PACs) is a current target of reformers' zeal. According to the author, previous reforms created this specter. Campaign contribution and spending limits imposed out of concern that big money corrupted candidates and distorted the electoral process encouraged the formation of PACs and their independent spending for and against candidates. Money that would have gone to candidates now goes to PACs, and PACs which would have contributed to candidates now do their own political spending. The author argues that current reform proposals will have similar, unanticipated adverse effects. He therefore proposes realistic spending and contribution limits and improved disclosure requirements to safeguard the political process.

INTRODUCTION

IN THE 1980 federal elections, PACs[1] independently[2] spent more than $12.9 million supporting presidential candidates and nearly $1 million supporting candidates for the Senate and House of Rep-

* Professor of Law, Case Western Reserve University School of Law. A.B., Case Western Reserve University (1965); J.D., Case Western Reserve University School of Law (1968). The author gained firsthand understanding of election finance reform as legislative assistant to Representative Louis Stokes (D-Ohio) from 1971-73.

1. The Federal Election Campaign Act of 1971 (FECA) defines political committee as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4)(A) (1982). The Presidential Campaign Fund Act's definition is "any committee, association, or organization (whether or not incorporated) which accepts contributions or makes expenditures for the purpose of influencing, or attempting to influence, the nomination or election of one or more individuals to Federal, State, or local elective public office." *Id.* § 9002(9).

2. FECA defines independent expenditure as

> an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate.

Id. § 431(17).

resentatives.[3] In addition, PACs spent more than $2 million for negative advertising in which they attacked one candidate without promoting another.[4] In the 1982 congressional election, PACs spent nearly $1.2 million supporting Senate and House candidates.[5] They also doubled their 1980 total in negative advertising by spending more than $4 million.[6] PACs not affiliated with any corporation, union, or trade association made nearly all the independent expenditures.[7] Conservative Republicans were the principal beneficiaries; liberal Democrats were the primary targets.[8]

---

3. FED. ELECTION COMM'N, 1979-1980 INDEX OF INDEPENDENT EXPENDITURES 318 (1981).

4. 1 FED. ELECTION COMM'N, 1979-1980 REPORTS ON FINANCIAL ACTIVITY, FINAL REPORT: PARTY AND NON-PARTY POLITICAL COMMITTEES 125 (1982) [hereinafter cited as 1979-1980 FEC PAC REPORT].

5. 1 FED. ELECTION COMM'N, 1981-1982 REPORTS ON FINANCIAL ACTIVITY, INTERIM REPORT NO. 4: PARTY AND NON-PARTY POLITICAL COMMITTEES 118 (1983) [hereinafter cited as 1981-1982 FEC PAC REPORT].

6. *Id.* at 119.

7. In 1980, unaffiliated PACs accounted for more than $11 million in expenditures for federal candidates. Trade association and health field PACs spent nearly $800,000 and labor union PACs only $80,000. In the negative spending category, unaffiliated PACs spent approximately $1.8 million, trade association PACs $190,000, and labor union PACs nearly $11,000. 1 1979-1980 FEC PAC REPORT, *supra* note 4, at 124-25. In 1982, with no presidential election, these figures decreased dramatically. Unaffiliated PACs independently spent only $372,000 in support of candidates. Trade, membership, and health PACs accounted for $807,000, while labor PACs expended $41,000. 1 1981-1982 FEC PAC REPORT, *supra* note 5, at 118. However, unaffiliated PACs spent an astounding $4 million in negative advertising, whereas trade, membership, and health PACs expended a mere $7,561, and labor PACs spent nothing for negative advertising. *Id.* at 119.

8. Approximately $11.25 million was spent in the presidential campaigns to support Republican candidates. 1 1979-1980 FEC PAC REPORT, *supra* note 4, at 117. Candidate Reagan received about 78% of this funding. Candidates John Connally and John Anderson received 14% and 9%, respectively. These percentages likely understate the Reagan share since they were derived from the percentages individual candidates received during the prenomination period. Reagan, of course, received 100% of the postnomination support. *See* FED. ELECTION COMM'N, 1979-1980 REPORTS ON FINANCIAL ACTIVITY, FINAL REPORT: PRESIDENTIAL PRE-NOMINATION CAMPAIGNS 8 (1981) [hereinafter cited as PRESIDENTIAL PRE-NOMINATION REPORT].

A committee to draft Senator Edward Kennedy spent more than $500,000 before he became a candidate. Kennedy supporters also spent $56,000 on behalf of his campaign after he became a candidate. *Id.* In contrast, the Carter campaign benefited from only $18,000 in the prenomination period and $27,000 in the 1979-80 period. *Id.*; 1 1979-1980 FEC PAC REPORT, *supra* note 4, at 117. The 1980 and 1982 congressional elections also reflected substantial PAC support for Republican candidates. In the 1980 Senate races, nearly $342,000 was spent independently in support of candidates. *Id.* at 120. In the House races the comparable figure was approximately $569,000. *Id.* at 122. In the 1982 elections, more than $421,000 was spent independently in support of Senate candidates, and $757,000 was expended on House races. 1 1981-1982 FEC PAC REPORT, *supra* note 5, at 114-16. Roughly two-thirds of this money aided Republican candidates. *See id.*

The most glaring disparity between the parties with respect to independent spending arose in the negative spending category. Nearly $2 million was spent in opposition to Democratic

Although independent expenditures were a small percentage of the total funds spent by PACs in the 1980 federal elections,[9] they were substantial in a few races, especially the presidential campaign. Independent expenditures supporting Ronald Reagan were more than one-third the amount the Reagan campaign could spend under the public financing law.[10] PACs raised large sums for the 1984 elections; much of this money was disbursed as independent expenditures.[11]

---

candidates in 1980, while less than $100,000 was spent against Republican candidates. 1 1979-1980 FEC PAC REPORT, *supra* note 4, at 125. These figures rose dramatically in 1982, with more than $3.5 million being spent in opposition to Democrats, and only $544,000 against Republicans. 1 1981-1982 FEC PAC REPORT, *supra* note 5, at 119.

In the 1980 presidential election, Democrats fared better than Republicans in only one category, "communication costs." This category measures corporate, union, and other membership organization treasury funds used to communicate with members or shareholders in support of candidates. For further discussion of communication costs, see *infra* note 187 and accompanying text. Approximately $4 million of spending in this category was reported in 1980. H. ALEXANDER, FINANCING THE 1980 ELECTION 122-23 (1983). Democratic presidential candidates received nearly $2.2 million of support, and Republican presidential candidates just $321,000. *Id.* Much of the spending in this category is not reported. FECA requires reporting of only those costs that exceed $2,000 per candidate. 2 U.S.C. § 431(9)(B)(iii) (1982).

9. Most PACs use their resources primarily to make contributions to candidates. In the 1979-80 reporting period, PACs contributed more than $60 million while independent expenditures on behalf of candidates totaled $12 million. 1 1979-1980 FEC PAC REPORT, *supra* note 4, at 101. In the 1981-82 reporting period, PACs contributed more than $87 million to candidates while independent expenditures totaled slightly more than $1.2 million. 1 1981-1982 FEC PAC REPORT, *supra* note 5, at 95. In 1980, unaffiliated PACs were the only group spending less on direct candidate contributions than on independent expenditures. *See* 1 1979-1980 FEC PAC REPORT, *supra* note 4, at 101. They made expenditures of $11.3 million and contributions of $5.2 million. *Id.* In contrast, in the 1981-82 campaign period, unaffiliated groups contributed $11 million to candidates but spent only $372,000 independently in support of candidates. 1 1981-1982 FEC PAC REPORT, *supra* note 5, at 95.

10. The statute which provides for public funding of presidential general election campaigns requires candidates who accept public funding to agree to a spending limit for the general election of $20 million, increased every election to allow for inflation. 2 U.S.C. § 441a(b)-(c) (1982); *see generally* 26 U.S.C. §§ 9003-9004 (1982) (public financing requirements). The limit set for each major party candidate in 1980 was $29.44 million; Carter and Reagan each received that amount. FED. ELECTION COMM'N, 1981 ANNUAL REPORT 7 (1981).

11. For example, the National Conservative Political Action Committee (NCPAC), which is the largest and best known of the conservative PACs, ran a $2 million independent spending campaign against Walter Mondale and planned to spend another $2 million against three Democratic senatorial candidates. *Rebuilding the Right*, Wall St. J., Mar. 14, 1984, at 48, col. 1.

Labor unions spent heavily on voter education, get-out-the-vote drives, and communication costs to help Mondale win the Democratic presidential nomination. *See Old Time Politics*, Wall St. J., July 5, 1984, at 6, col. 4; *Stunned by Mondale Defeats, Unions Face a Problem: Ally Hart Is Hard to Criticize*, Wall St. J., Mar. 7, 1984, at 52, col. 1.

Union PACs also contributed heavily to the delegate committees ostensibly organized by Mondale convention delegate slates. These committees engaged in what they alleged was

The channeling of political campaign funds into PACs and of PAC money into independent expenditures is a direct result of previous campaign finance reforms, as modified by Supreme Court decisions. Although limits on contributions to and from PACs may withstand Supreme Court scrutiny, it is unlikely that restraints on PACs' independent spending will be upheld.[12] During the 1984 Term, the Court is expected to decide the constitutionality of the only remaining limits on campaign spending by PACs.[13]

The results of earlier reforms demonstrate that political money is like toothpaste in a giant tube: "If the top is squeezed, it moves to the bottom. If the bottom is squeezed, it moves to the top. If the middle is squeezed, it moves to both ends. But it is always there, and it will always move to the point of least resistance."[14]

This Article examines the genesis of independent expenditures by PACs,[15] discusses the issues such spending raises,[16] and considers proposed means of regulation.[17] Finally, it advocates changes in the overall system of federal campaign finance regulation that will curb further growth in independent spending by PACs.[18]

I. GENESIS

Neither the PAC nor the independent expenditure of campaign funds is new. Corporations and labor unions have used both de-

---

independent spending in support of Mondale in their local areas. One reason for the tactic was Mondale's vow that he would accept no PAC contributions. *See Hart Attacks Mondale Delegate Groups*, N.Y. Times, Apr. 23, 1984, at 37, col. 1. This device also enabled the Mondale campaign to exceed spending ceilings in some states. *E.g.*, *Mondale Spending Exceeded Ceiling in New Hampshire*, Wall St. J., Apr. 30, 1984, at 46, col. 1. Vigorous criticism by his opponents and by the media forced Mondale to terminate the committees and to take steps to return the funds. *See Mondale Directs Disputed Groups to End Operation*, N.Y. Times, Apr. 26, 1984, at 1, col. 8. Despite Mondale's directive, it appeared that several months would elapse before the delegate groups ceased operations. *See Delegate Groups Continue Despite Mondale's Pledge*, N.Y. Times, May 28, 1984, at 1, col. 6.

12. *See infra* notes 124-43 and accompanying text.

13. *See* Democratic Party v. National Conservative Political Action Comm., 578 F. Supp. 797 (E.D. Pa. 1983) (three-judge district court found unconstitutional the Presidential Election Campaign Fund Act's limit of $1,000 on independent spending by PACs in presidential campaigns), *prob. juris. noted sub nom.* Federal Election Comm'n v. National Conservative Political Action Comm., 104 S. Ct. 1906 (1984). For further discussion of this case, see *infra* notes 44-51 and accompanying text.

14. J. ARMOR, TAX MONEY VS. PRIVATE MONEY: PRACTICAL, THEORETICAL & CONSTITUTIONAL CONSIDERATIONS IN THE FUNDING OF FEDERAL ELECTIONS 9 (1983) (pamphlet published by Public Service Research Foundation).

15. *See infra* notes 19-54 and accompanying text.

16. *See infra* notes 55-143 and accompanying text.

17. *See infra* notes 144-81 and accompanying text.

18. *See infra* notes 182-93 and accompanying text.

vices for years to avoid prohibitions against making direct political contributions and expenditures.[19]

One of the purposes of the prohibitory legislation was to prevent corruption of the electoral process and of candidates.[20] Over the years, courts allowed unions and corporations to make what are now called independent expenditures, perhaps because they thought the corruption potential of such expenditures was minimal.[21] The courts permitted political publications and media advertising directed at union members even when the message also reached nonmembers.[22] Voter registration drives and other "nonpartisan"

19. President Theodore Roosevelt urged the prohibition of corporate contributions which Congress enacted in 1907. *See* Act of January 26, 1907, ch. 420, 34 Stat. 864 (current version at 2 U.S.C. § 441b (1982)); Bolton, *Constitutional Limitations on Restricting Corporate and Union Political Speech*, 22 ARIZ. L. REV. 373, 375-81 (1980). Union contributions were first limited to $5,000 by the Hatch Act in 1940, ch. 640, § 13, 54 Stat. 767, 770 (1940) (repealed 1943), then altogether barred by the War Labor Disputes (Smith-Connally) Act, ch. 144, § 9, 57 Stat. 163, 167 (1943) (current version at 2 U.S.C. § 441b (1982)). The Labor-Management Relations (Taft-Hartley) Act of 1947 made permanent this provision of the Smith-Connally Act, which was scheduled to expire six months after the end of World War II. Ch. 120, § 304, 61 Stat. 136, 159 (1947). Taft-Hartley also initiated the prohibition of political expenditures by corporations. Bolton, *supra*, at 385.

20. Commentators differ over President Theodore Roosevelt's precise motivation for opposing corporate contributions. *Compare* Note, *Corporate Democracy and the Corporate Political Contribution*, 61 IOWA L. REV. 545, 546-49 (1975) (asserting that avoidance of candidate corruption by corporations was Roosevelt's principal objective) *with* Bolton, *supra* note 19, at 375-79 (asserting that Roosevelt's main purpose was protecting shareholders' rights and that the corruption which concerned Roosevelt was corruption of the electorate, not candidates). The first court to construe the original prohibition of corporate political contributions stated that the statute's "purpose is to guard elections from corruption." United States v. United States Brewers' Ass'n, 239 F. 163, 169 (W.D. Pa. 1916). That court's opinion lends credence to the idea that Congress feared corruption of the electorate rather than of candidates. The court stated that "the concerted use of money is one of the many dangerous agencies in corrupting the elector and debauching the election." *Id.*

21. See, e.g., Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam), which discounts the corruption potential of independent expenditures.

22. Soon after political expenditures were prohibited, the CIO and its president were indicted for using union funds to publish a union newspaper urging union members to vote for a candidate. In United States v. CIO, 335 U.S. 106 (1948), the Court avoided first amendment issues and held that the statutory prohibition did not apply to union funds used to publish and distribute a regular periodical, even if the publication endorsed a candidate. *Id.* at 123. The indictment did not specifically allege that the periodical went to nonsubscribers or nonmembers. The Court assumed that the newsletter went "to those accustomed to receive copies." *Id.* However, some nonmembers must have been "accustomed to receive copies." Rauh, *Legality of Union Political Expenditures*, 34 S. CAL. L. REV. 152, 156 n.19 (1961). In United States v. Painters Union, 172 F.2d 854 (2d Cir. 1949), the court held that the statute did not prohibit the use of union treasury funds to buy political advertisements supporting a candidate on a commercial radio station and in a newspaper of general circulation. The court noted that the union had no house periodical. *Id.* at 856. In a subsequent case, the Supreme Court avoided the first amendment issue and refused to hold that the statute permitted all union expenditures for political advertising. The Court reversed the

political activities, conducted by unions with union funds, were held not to violate the prohibitions even though the unions designed these drives to help favored candidates.[23]

A second apparent purpose of the prohibition against corporate and union contributions was to prevent misuse of funds which belonged to union members or corporate shareholders. Although corporate or union treasury funds could not be used for political contributions, courts began to allow union members and corporate shareholders voluntarily to contribute money for political causes.[24] PACs began to collect these voluntary contributions from individual members or shareholders and then disburse these sums to candidates. Candidates could identify the PAC contribution with the interests of the parent corporation or union.

Independent expenditures enabled corporations and labor unions to use treasury funds for political purposes, and the formation of PACs enabled them to collect, aggregate, and contribute non-treasury political money. These devices gave corporations and unions political influence which the reformers had neither expected nor desired. Contribution and spending limits imposed in the 1970's further stimulated the formation of PACs and the growth of their independent expenditures.[25]

During the 1970's, Congress reformed and regulated the financing of federal political campaigns by enacting the Federal Election

---

lower court's dismissal of an indictment which charged that the defendant had "used union dues to sponsor commercial television broadcasts designed to influence the electorate to select certain candidates for Congress." United States v. UAW, 352 U.S. 567, 585 (1957). The case was remanded to the trial court for proof on several factual issues deemed important by the Court: (1) whether the money was from dues or voluntary contributions; (2) whether the broadcast reached the public or just the membership; (3) whether the union was engaged in "active electioneering," or was just stating the candidates' records; and (4) whether the union intended to influence the outcome of the election. *Id.* at 592. On remand, the union was acquitted by a jury "even though the union did not contest the bare allegations of the indictment." Rauh, *supra*, at 160 n.40.

23. "[S]urely it could not have been the intention of the Congress to deprive any group, labor organization or corporation from making expenditures . . . in connection with the registration of voters, for such registration is beneficial to all candidates . . . and to all political parties." United States v. Construction & Gen. Laborers Local 264, 101 F. Supp. 869, 875 (W.D. Mo. 1951). Unions have, however, used supposedly nonpartisan voter registration activity to support particular candidates. Bolton, *supra* note 19, at 392-93; Rauh, *supra* note 22, at 154-55.

24. *See, e.g.*, United States v. UAW, 352 U.S. 567, 592 (1957); United States v. Anchorage Cent. Labor Council, 193 F. Supp. 504, 507 (D. Alaska 1961).

25. The number of PACs has increased from 609 to 3,803 in the last decade. *Behind All the Fuss Over Election Money*, U.S. NEWS & WORLD REP., Oct. 8, 1984, at 73.

Campaign Act of 1971.[26] This statute largely relied on disclosure of individual contributions and candidate expenditures. The only limit was on candidates' media expenditures. Amounts spent by others for media on behalf of a candidate were counted toward the candidate's expenditure limit.[27] This provision was the first that attempted to reach independent expenditures.[28]

The conduct of the presidential election of 1972 and the subsequent Watergate investigation spurred efforts to improve the 1971 legislation. The Senate Select Committee that conducted the Watergate investigation recommended limits on contributions in all federal campaigns and on expenditures in presidential campaigns.[29] Senate and House committees studying the proposals believed that disclosure alone, without limits on contributions and expenditures, was inadequate.[30] The result was the Federal Election Campaign Act Amendments of 1974.[31] In the 1974 amendments, Congress imposed limits on contributions to federal candidates and on candidate and independent expenditures. Congress also provided public financing for presidential campaigns.

In the 1974 legislation, the definition of a "contribution" included virtually any transfer of money to a candidate or his committee for campaign uses.[32] "Expenditure" was defined to cover all

26. Pub. L. No. 92-225, 86 Stat. 3 (1972) (current version at 2 U.S.C. §§ 431-455 (1982)).

27. *Id.* § 104(a)(6), 86 Stat. at 6 (repealed 1976).

28. "[A]mounts spent for use of communications media on behalf of any . . . candidate for Federal . . . office . . . [were to] be deemed to have been spent by the candidate . . . whether or not the person making the expenditure is authorized by the candidate to do so." S. CONF. REP. No. 580, 92d Cong., 1st Sess. 25-26, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 1866, 1871.

29. *See* S. REP. No. 981, 93d Cong., 2d Sess. 567-71 (1974).

30. The Senate Committee on Rules and Administration stated in its report on the bill that the scurrying to raise funds before the disclosure provisions of the 1971 Act became effective "resulted in broad and grave dissatisfaction with the Act and led to a demand for new and more comprehensive controls." S. REP. No. 689, 93d Cong., 2d Sess. 2, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 5587, 5588. The Committee on House Administration stated the matter more bluntly:

> The unchecked rise in campaign expenditures, coupled with the absence of limitations on contributions and expenditures, has increased the dependence of candidates on special interest groups and large contributors. Under the present law the impression persists that a candidate can buy an election by simply spending large sums in a campaign.

H.R. REP. No. 1239, 93d Cong., 2d Sess. 3 (1974).

31. Pub. L. No. 93-443, 88 Stat. 1263 (1974) (current version at 2 U.S.C. §§ 431-455 (1982)).

32. *Id.* § 102(c), 88 Stat. at 1269-70 (current version at 2 U.S.C. § 431(8)(A)-(B) (1982)).

payments to others to promote a candidate's election.[33] Although candidates and their committees make most expenditures, Congress imposed limits on independent spending as well. The dollar limit on independent expenditures in Senate and House campaigns was $1,000 for all individuals and PACs.[34] The limit on contributions in congressional campaigns was $1,000 for individuals and PACs but $5,000 for multicandidate PACs.[35] Although there was no limit on individuals' independent expenditures in a presidential campaign, a PAC could spend no more than $1,000.[36] Contributions to presidential candidates who accept public financing were barred in the general election campaign.[37] The statutory dollar limits encouraged contributions rather than independent expenditures because of the higher limit for contributions by multicandidate PACs.

Buckley v. Valeo,[38] a 1976 Supreme Court decision, changed the whole scheme. In *Buckley*, the Court struck down all expenditure limits, except for publicly funded candidates and independently spending political committees in presidential campaigns. The Court found that expenditure limits restricted political speech in violation of the first amendment, but that the provision of basic funding from the public treasury justified the spending limits on publicly funded candidates in the presidential campaign.[39] The Court upheld contribution limits because of the risk of corruption and the appearance

33. *Id.* § 102(d), 88 Stat. at 1270-71 (current version at 2 U.S.C. § 431(9)(A)-(B) (1982)).

34. *Id.* § 108(a), 88 Stat. at 1265 (repealed 1976).

35. *Id.* § 101(a), 88 Stat. at 1263 (current version at 2 U.S.C. § 441a(a)(1)-(2) (1982)).

36. Presidential Election Campaign Fund Act, Pub. L. No. 92-178, § 9012(f), 85 Stat. 562, 572 (1972) (current version at 26 U.S.C. § 9012(f)(1) (1982)).

37. 26 U.S.C. §§ 9003(b)(2), 9012(b)(1) (1982). The prohibition is directed at the candidate and his authorized committee, not the contributor. Candidates are forbidden to accept contributions except to make up a deficiency if federal funds available are less than the spending limit. *Id.* § 9012(b)(1).

38. 424 U.S. 1 (1976) (per curiam).

39. *Id.* at 58. In Republican Nat'l Comm. v. Federal Election Comm'n, 445 U.S. 955, *aff'g summarily* 487 F. Supp. 280 (S.D.N.Y. 1980), the Supreme Court upheld public financing of presidential elections, a question which appeared already to have been resolved in *Buckley*. Suits to "implement or construe" the Presidential Election Campaign Fund Act are to be heard by a district court panel of three judges, with appeal directly to the Supreme Court. 26 U.S.C. § 9011(b) (1982). The three-judge district court in *Republican Nat'l Comm.* said candidates may forego their rights to unlimited contributions and expenditures in exchange for public funding. 487 F. Supp. at 283-84. Because candidates are not compelled to abide by the spending limit and public funding provides merely an additional funding alternative, the court said the provisions of the Presidential Election Campaign Fund Act did not violate the first amendment rights of either candidates or supporters. *Id.* at 285. The court assumed that limits on independent expenditures by PACs in presidential elections had been held unconstitutional in *Buckley*. *Id.* at 286.

of corruption when individuals or PACs seeking political favors can make unlimited contributions to candidates.[40] The Court found that expenditure limits directly burdened speech while the danger of corruption and the appearance of corruption outweighed the more indirect speech involved in political contributions.[41]

After *Buckley*, all PACs had an incentive to make independent expenditures rather than contributions. Contributions were subject to the $1,000 or $5,000 per candidate per election limits, while the only limit on independent expenditures was the one restricting PAC spending in presidential campaigns.

The constitutionality of this limit was dubious after *Buckley*. Five PACs announced that they intended to raise and spend millions of dollars supporting Ronald Reagan in the 1980 presidential race.[42] They purported to be independent of Reagan and his election committee, so that their spending would not violate contribution limits or be treated as expenditures made by Reagan or his committee.[43]

In *Common Cause v. Schmitt*,[44] Common Cause and the Federal Election Commission (FEC) sued to enjoin these independent PAC expenditures. However, a three-judge district court panel[45] found the $1,000 limit on independent expenditures "facially unconstitutional,"[46] reiterating the *Buckley* rationale that there is little risk of corruption or apparent corruption from independent expenditures.[47] Further, the panel refused to hear Common Cause's claim that the PACs had coordinated their expenditures with the Reagan campaign, on the ground that the FEC had exclusive jurisdiction to enforce the statute.[48]

On appeal, the Supreme Court split four to four, allowing the panel's decision to stand.[49] The battle over the constitutionality of the independent spending limit in presidential campaigns may be

40. *See* 424 U.S. at 24-38.

41. *Id.* at 58-59.

42. For a listing of the five committees and a description of their activities in 1980, see Note, *The Constitutionality of Regulating Independent Expenditure Committees in Publicly Funded Presidential Campaigns*, 18 HARV. J. ON LEGIS. 679, 685-88 (1981).

43. *Id.* at 687.

44. 512 F. Supp. 489 (D.D.C. 1980), *aff'd without opinion by an equally divided court*, 455 U.S. 129 (1982). Common Cause and the FEC had filed separate suits which were consolidated in the district court. 512 F. Supp. at 489.

45. Such panels are required by 26 U.S.C. § 9011(b) (1982). *See supra* note 39.

46. 512 F. Supp. at 489.

47. *Id.* at 494-96.

48. *Id.* at 501-03.

49. 455 U.S. at 129. Justice O'Connor did not participate, apparently because her hus-

settled by the Supreme Court in its 1984 Term.[50]

Since *Buckley*, the number of PACs and the amount of their independent expenditures have grown tremendously. PACs can now raise enormous sums of political money from a large number of donors and use the money to elect federal candidates without violating any of the remaining restrictions on contributions or expenditures.

In light of *Common Cause v. Schmitt*, it is unlikely that any well-managed PAC will be subject to sanctions because its expenditures are found to be not independent. Sanctions are improbable since private parties cannot sue to enforce the campaign finance statute,[51] and the agency which is charged with enforcement, the FEC, is deadlocked because its membership is equally divided between Democrats and Republicans.[52] Injunctive relief during a campaign is unlikely due to administrative delays and the FEC's understandable reluctance to intervene quickly and risk tilting an election. Politicians seldom seek postelection sanctions since they do not change the outcome. Traditionally, election losers do not complain about how winners won, and winners do not complain about ineffective misconduct. Given the difficulties of proving coordination of expenditures with a candidate or his committee, neither a candidate nor the FEC is likely to pursue postelection remedies.[53]

Some revisions are needed to insure that independent expendi-

band had served on the finance committee of a pro-Reagan independent spending PAC. E. DREW, POLITICS AND MONEY 143 (1983).

50. The FEC and the Democratic National Committee filed separate actions seeking declaratory judgments that the statute was constitutional. The cases were consolidated. A three-judge district court ruled that the statute was unconstitutional. Democratic Party v. National Conservative Political Action Comm., 578 F. Supp. 797 (E.D. Pa. 1983), *prob. juris. noted sub nom.* Federal Election Comm'n v. National Conservative Political Action Comm., 104 S. Ct. 1906 (1984).

51. The three-judge panel in *Schmitt* said private plaintiffs cannot enforce compliance with the campaign financing statutes, because 2 U.S.C. § 437c(b)(1) (1982) reserves exclusive jurisdiction over civil enforcement of the provisions of both FECA and the Presidential Election Campaign Fund Act to the FEC. 512 F. Supp. at 502. In *Democratic Party v. National Conservative Political Action Comm.*, the three-judge panel said private plaintiffs could sue to obtain a declaratory judgment on constitutionality under 26 U.S.C. § 9011(b) (1982). 578 F. Supp. at 803-07. The court said there is no private right of action under FECA but that this does not extend to the Presidential Election Campaign Fund Act. *Id.* at 807 n.12.

52. 2 U.S.C. § 437c(a)(2)(A) (1982).

53. *See* Note, *Campaign Finance Re-Reform: The Regulation of Independent Political Committees*, 71 CAL. L. REV. 673, 690-91 (1983) [hereinafter cited as Note, *Campaign Finance Re-Reform*]; Note, *Independent Political Committees and the Federal Election Laws*, 129 U. PA. L. REV. 955, 978-83 (1981) [hereinafter cited as Note, *Independent Political Committees*].

tures are really independent.[54] This is a difficult task which will not solve the problems caused by independent PAC spending. Indeed, the less control the candidate has over campaign spending, the more serious some of the problems may become.

II. ISSUES RAISED BY THE PAC PHENOMENON

A. *Inequality*

1. *First Impressions*

Most discussions about the impact of PACs focus on the gross inequality that could arise if all PAC support flowed to candidates of one party. A major purpose of the campaign finance legislation passed by the Democratic Congress in 1974 was reducing the Republican Party's traditional fundraising advantage while preserving or enhancing the power of pro-Democratic labor unions.[55]

The campaign reform legislation of the 1970's clarified and enhanced the pro-Democratic labor unions' use of PACs. The same legislation facilitated the growth of corporate and unaffiliated conservative PACs.[56] The Democratic party tried "reform" legislation

54. For discussions of the present problems in distinguishing between independent expenditures and contributions and suggested standards for making the distinction, see Note, *Campaign Finance Re-Reform*, *supra* note 53, at 691-702; Note, *Making Campaign Finance Law Enforceable: Closing the Independent Expenditure Loophole*, 15 U. MICH. J.L. REF. 363, 370-83 (1982) [hereinafter cited as Note, *Making Campaign Finance Law Enforceable*].

55. The 1974 debates reveal the political motivation behind the FECA Amendments of 1974. One need not be "overly cynical" (in the words of Senator James Buckley) to recognize that the legislation proposed and passed by a Congress controlled by Democrats was designed to help Democrats. *See* 120 CONG. REC. 8469 (1974).

The principal provisions thought to favor Democrats were the public financing provisions and the expenditure limits. It was suggested that the low expenditure limits contained in the House bill were designed to protect incumbents, most of whom were Democrats at the time. *Id.* at 9540. The advantage of incumbency was one thing the Republicans who voted for the legislation had in common with the Democrats. *See, e.g.*, 120 CONG. REC. 27,217 (1974) (statement of Rep. Clarence Brown).

Professor Ralph Winter said that "the exercise . . . going on in Congress is not the cleansing of the political process but the skewing of it. Those in power are seeking to maximize that power." *Id.* at 10,561. Winter suggested that unions favored elimination of private contributions "because their own power would be relatively increased as a result of the host of 'indirect contributions' they can provide." *Id.* Senator Tower offered an amendment to limit such "indirect contributions" by unions. The amendment was defeated with few Democrats supporting it. *Id.* at 10,932-33. Republican Representative Crane would have offered a similar amendment in the House but the rule which was adopted barred it. *Id.* at 27,226-27.

56. The 1971 legislation continued the prior prohibition of corporate and labor union contributions to campaigns but introduced the separate segregated fund concept. FECA, Pub. L. No. 92-225, 86 Stat. 3 (1972) (current version at 2 U.S.C. § 441b (1982)). Labor union PACs were permitted to solicit contributions from members and corporate PACs were permitted to solicit contributions from shareholders. The Supreme Court, relying on the

as a way to shift campaign finance inequities to its side of the balance. Ironically, the legislation produced an astounding increase in pro-Republican, business PACs, enhancing any existing campaign finance inequities in favor of Republicans.[57]

The popular view is that this growth helps conservative Republican candidates and hurts liberal Democrats. This may not even be true in open-seat elections, where most PAC money is thought to flow to the Republican candidate.[58] In other elections, incumbents

---

1971 statute, has upheld the legality of a union-controlled separate segregated fund. Pipefitters Local 562 v. United States, 407 U.S. 385 (1972).

The FEC has interpreted the 1971 law to permit corporations to solicit employees as well as shareholders. FEC Advisory Opinion (SUN PAC), 40 Fed. Reg. 56,584 (1975). Apparently concerned that the FEC had tipped the balance too far toward the corporate PACs by broadening their base for solicitations, Congress narrowed the class of corporate employees from whom separate segregated funds could solicit contributions. Pub. L. No. 94-283, § 112, 90 Stat. 475, 491-92 (current version at 2 U.S.C. § 441b(b)(4)(A) (1982)). The 1976 legislation provided that only shareholders and executive and administrative personnel and their families could be solicited generally by a corporate PAC, and that only union members and their families could be solicited generally by a labor PAC. *Id.* Twice a year a corporate PAC was permitted to solicit its union employees by mail and a union PAC was permitted to solicit the employer's shareholders and executive and administrative personnel in the same manner. 2 U.S.C. § 441b(b)(4)(B) (1982). The legislation prohibited company or union creation of multiple PACs to avoid the contribution limits. *Id.* § 441a(a)(5). Union PACs were given the right to use payroll deductions to collect contributions if the company used that method to collect money from its constituency. *Id.* § 441b(b)(6). Finally, other types of organizations, including trade associations, were authorized to form PACs. *Id.* § 441b(b)(4)(D). Thus, the "reform" legislation has been described as the "root cause of the PAC Phenomenon." Epstein, *The PAC Phenomenon: An Overview*, 22 ARIZ. L. REV. 354, 358 (1980).

57. Fed. Election Comm'n, PAC's Increase in Number (Jan. 14, 1983) (press release). The inference that business involvement in electoral politics has risen dramatically is not necessarily supported by the PAC figures, however. "The problem with the inference is that a business PAC contribution is only one of a number of ways in which people in business participate in electoral politics." Malbin, *Neither a Mountain nor a Molehill*, REGULATION, May/June 1979, at 42. Before the campaign reforms, business executives could give unlimited individual contributions, and corporate funds were passed to candidates through individuals or through in-kind services such as use of corporate aircraft. "Faced with all this, Congress decided in 1974 that it preferred the open participation of corporations through political action committees to the covert participation then in vogue." *Id.*

58. In the 1980 election, Republicans running for open seats in the Senate received over twice as much total PAC support, $2,047,000, as Democrats, $924,000. 1 1981-1982 FEC PAC REPORT, *supra* note 5, at 100-02. Corporate PACs contributed $1,226,000 to Republicans and only $123,000 to Democrats in these races. *Id.* Union PACs gave $460,000 to Democrats and only $30,900 to Republicans. *Id.* In the House, however, Democrats received slightly more, $4.78 million in total PAC support, than Republicans, $4.6 million, in the races for open seats. *Id.* Although the corporate PACs gave three times as much to Republicans as to Democrats, $1.92 million to $654,000, the labor PACs more than made up for the difference by supporting Democrats over Republicans $2.51 million to $121,000. *Id.*

Democrats are doing well in the quest for PAC money for the 1984 election. As of May 1, 1984, Democrats had raised a larger percentage of their funds from PACs than Republicans. *House Reelection Campaigns*, Wall St. J., May 1, 1984, at 62, col. 1.

of both parties are the prime beneficiaries.[59] Despite the current tendency of PACs to support incumbents, liberals fear the balance will shift because there are nearly twice as many conservative individual PAC contributors as liberal contributors.[60] In addition, PACs unconnected to any business, union, or trade association are overwhelmingly conservative, and these PACs do most of the independent spending. Of the ten largest independent spending PACs in 1982, unaffiliated conservative PACs spent nearly $5 million while unaffiliated liberal PACs spent less than $300,000.[61]

2. *A Closer Examination of Spending Disparities*

The conservatives' financial advantage is far less significant than it first appears. Conservative PACs reported $10.6 million in independent expenditures for Reagan during the 1980 general election campaign.[62] However, a large percentage was spent on direct mail fundraising. It is likely that no more than one-third of the $10.6 million went into media advertising supporting Reagan.[63] Direct mail fundraising costs were reported as independent expenditures in support of Reagan since PACs identified him as their candidate in solicitation letters.[64] Those letters were sent to conservatives—people already leaning toward Reagan.[65] Thus, the PACs' impact on the 1980 presidential campaign was less significant than it appears from the expenditure statistics alone.

---

59. In the 1980 election, PACs gave three times as much to incumbents as challengers. 1 1981-1982 FEC PAC REPORT, *supra* note 5, at 100-02. As of May 1, 1984, 93% of PAC contributions to House members had gone to incumbents. *House Reelection Campaigns*, *supra* note 58, at 62, col. 1.

60. There are about seven million potential liberal donors and about fourteen million conservatives. 39 CONG. Q. WEEKLY REP. 1905, 1906 (1981).

In 1982 it appeared that labor PACs focused attention on the House to preserve Democratic control since there was little hope that the Democrats could retake the Senate. Corporate PACs may have given more to Democrats in open seat elections because they knew that the Democrats would remain in control and that Democrats would win more of the open seats since most of them had been held by Democrats.

61. Of the ten largest independent spending PACs in 1981-82, the top seven were conservative, and the bottom three were liberal. *Independent Spending Increases*, FED. ELECTION COMM'N REC., Dec. 1983, at 8. NCPAC, the largest conservative PAC, spent twenty times as much as its largest liberal counterpart, the Progressive Political Action Committee. *Id.* Only three of these ten independent spending PACs were connected to other organizations (the National Rifle Association, the American Medical Association, and the Realtors). *Id.* None were connected to a labor union. *Id.* Negative expenditures amounted to approximately 80% of the total spent by the group. *Id.*

62. H. ALEXANDER, *supra* note 8, at 303.

63. *See id.* at 318-19.

64. *Id.* at 319.

65. *Id.*

Similarly, independent PAC spending alone does not explain the results of senatorial races. The National Conservative Political Action Committee (NCPAC) targeted a number of incumbent Democratic senators in 1980.[66] Four 1980 races illustrate the extent of PAC influence in that election: even though all four Democrats lost, NCPAC's spending did not give the Republicans a substantial spending advantage in any of the races. Indeed, the 1980 Reagan landslide may have been the most important factor in the ouster of these Democratic senators.[67] For instance, Senator Frank Church lost to Republican Steve Symms, but outspent Symms in direct expenditures $1.9 million to $1.8 million.[68] Symms' campaign was further aided by $339,000 in independent spending against Church.[69] However, Church had the advantage of being an incumbent, which has been valued at approximately $500,000.[70] In spite of the independent PAC spending, then, Church had an overall financial advantage.

In South Dakota, where Senator George McGovern lost his seat to James Abdnor, McGovern's direct spending exceeded Abdnor's by $1 million.[71] Independent spending against McGovern totaled about $210,000.[72] When McGovern's incumbency advantage is considered, his resources exceeded Abdnor's by more than $1 million.

Senator Birch Bayh lost to Dan Quayle in Indiana, but Bayh's direct expenditures exceeded Quayle's by about $430,000.[73] Independent spending against Bayh totaled about $180,000.[74] Even

66. *Id.* at 396-98.

67. *See id.* at 396-400.

68. FED. ELECTION COMM'N, 1979-1980 REPORTS ON FINANCIAL ACTIVITY, FINAL REPORT: U.S. SENATE AND HOUSE CAMPAIGNS 222-26 (1982) [hereinafter cited as 1979-1980 FEC SENATE AND HOUSE CAMPAIGNS REPORT].

69. *Id.*

70. This estimate was made in 1977 and includes salary, staff, the franking privilege, and office and travel allowances. H. ALEXANDER, FINANCING POLITICS: MONEY, ELECTIONS, AND POLITICAL REFORM 146, 154-55 (2d ed. 1980).

In Winpisinger v. Watson, 628 F.2d 133 (D.C. Cir.), *cert. denied*, 446 U.S. 929 (1980), a supporter of Senator Kennedy unsuccessfully challenged President Carter's alleged abuse of his incumbency. The court held that the plaintiff lacked standing and therefore did not reach the merits. 628 F.2d at 137. For further analysis of this case, see Note, Winpisinger v. Watson: *Challenging the Incumbency Advantage in Presidential Elections*, 1 J.L. & POL. 167 (1983).

71. 1979-1980 FEC SENATE AND HOUSE CAMPAIGNS REPORT, *supra* note 68, at 413-18.

72. *Id.*

73. *Id.* at 239-44.

74. *Id.*

without the incumbency advantage, then, Bayh spent substantially more than was spent for Quayle.

Only in Iowa, where Senator John Culver lost to Charles Grassley, did a Republican challenger outspend a targeted Democratic incumbent with the aid of independent PAC spending. Grassley's direct spending exceeded Culver's, $2.2 million to $1.8 million.[75] About $187,000 was independently spent against Culver, while only about $60,000 was independently spent to support him.[76] When Culver's incumbency advantage is added to his total, however, Grassley's spending advantage was less than $100,000. Moreover, independent spending may have been less effective than direct spending in these senatorial races. Up to half of NCPAC's spending was for direct mail fundraising, some of which was sent to out-of-state residents who could not vote for the NCPAC candidate.[77]

In 1982, without Reagan on the ballot, conservative PACs could not claim as great an apparent influence in defeating Democrats. For example, Republican Raymond Shamie outspent Edward Kennedy by about $25,000,[78] and PACs independently spent more than $600,000 to oppose Kennedy.[79] Nonetheless, Kennedy won easily.[80] In Maryland, incumbent Democratic Senator Paul Sarbanes outspent Lawrence Hogan $400,000 to $210,000, but PACs spent nearly $500,000 attacking Sarbanes.[81] Yet Sarbanes still won.[82]

These examples debunk the myth that PACs in general, and independent spending PACs in particular, have caused the recent election losses suffered by liberal Democrats. Money provided by NCPAC and its ilk has not overwhelmed Democratic candidates.

---

75. *Id.* at 245-56.

76. *Id.*

77. H. ALEXANDER, *supra* note 8, at 400.

78. FED. ELECTION COMM'N, 1981-1982 REPORTS ON FINANCIAL ACTIVITY, INTERIM REPORT NO. 1: U.S. SENATE AND HOUSE CAMPAIGNS 189-94 (1982) [hereinafter cited as 1981-1982 FEC SENATE AND HOUSE CAMPAIGNS REPORT].

79. *Id.*

80. *See* 40 CONG. Q. WEEKLY REP. 2789, 2792 (1982) (Kennedy won 61% of the vote).

81. 1981-1982 FEC SENATE AND HOUSE CAMPAIGNS REPORT, *supra* note 78, at 183-88. NCPAC may have forced Sarbanes to spend more money early in his campaign than he otherwise would have. By June 30, 1982, Sarbanes had spent 46% of his funds to combat the negative spending by NCPAC. However, this negative advertising also made it easier for Sarbanes to raise money from liberal PACs and individuals. Hogan had spent 98% of his money by June 30 and may have been relying heavily on NCPAC support. 40 CONG. Q. WEEKLY REP. 1987, 1987 (1982).

82. *See* 40 CONG. Q. WEEKLY REP. 2789, 2792 (1982) (Sarbanes received 63% of the vote, 7% more than he received in 1976).

3. *Practical and Constitutional Restraints on Efforts to Equalize Funding*

In *Buckley v. Valeo*,[83] the Supreme Court rejected the use of expenditure limits to achieve or approach the goal of equality of campaign funding.[84] Rather, the Court found spending limits unconstitutional as direct restrictions on the quantity of political speech.[85] The Court held that the equality principle underlying voting rights and reapportionment cases did not justify restrictions on political expression.[86] The premise underlying the *Buckley* decision was that first amendment objectives are better served if candidates have unrestricted access to voters than if access is equalized by a limit on expenditures.[87] The Court pointed out nonfunding advantages that one candidate may have over another, for example, name recognition and incumbency in the same or a different office.[88]

The Court recognized that achieving true equality among candidates is impossible. Incumbents, not their challengers, are benefited by equal expenditure limits since incumbents already have high name recognition and can campaign indirectly without spending campaign funds. They can, for example, use congressional franking privileges, introduce legislation benefiting their districts, and manufacture news events.[89]

Nonetheless, some proponents of campaign finance reforms continue to argue that the wealthy should be prohibited from dominating political speech. Judge J. Skelly Wright contends: "Unchecked political expenditures, no less than crass regulation of ideas, may drown opposing beliefs . . . . Limiting the amount that wealthy interests may spend to publicize their views enhances the self-expression of individual citizens who lack wealth, furthering the values of freedom of speech."[90]

---

83. 424 U.S. 1 (1976) (per curiam).

84. *Id.* at 44-51.

85. *See id.*

86. *Id.* at 49 n.55.

87. *Id.* at 48-49.

88. *Id.* at 32.

89. *See* H. ALEXANDER, *supra* note 70, *passim*.

90. Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 636 (1982). Similarly, Rawls argues that the wealthy should not be "permitted to use their advantages to control the course of public debate." J. RAWLS, A THEORY OF JUSTICE 225 (1971). Dean Rosenthal asserts that "reducing inequities in the opportunities of candidates and their supporters to persuade the electorate" is a "worthy" goal which is "not only consistent with but indispensable to the attainment of the most fundamental purposes of the Constitution." Rosenthal, *Campaign Financing and the Constitution*, 9 HARV. J. ON LEGIS. 359, 360 (1970).

In *First National Bank v. Bellotti*,[91] the Court struck down restrictions on corporate contributions in referendum elections. Justice White in dissent suggested that the result might have been different if a candidate election had been involved.[92] Justice White said that even the majority might have approved restrictions to prevent "corporate domination of the electoral process."[93] He and Justices Brennan and Marshall felt that such domination did exist in *Bellotti*,[94] but the majority disagreed.[95]

If it could be shown that the political process had been distorted by one group's domination, a narrowly drawn statute preventing a wealthy candidate or interest group from overwhelming the opposition might survive constitutional challenge.[96] Such a statute, however, "would require extraordinarily difficult determinations about the specific effect of multiple communications in particular political campaigns."[97] The same objective might be achieved by subsidizing or otherwise enhancing the opposing voices rather than restricting the dominant one. The result would be an increase rather than a decrease in the quantity of speech.[98] A narrowly drawn statute designed to prevent a candidate's voice from being drowned out by better financed opponents would have to permit wide disparity in spending. A statute that restricts the speech of the dominant group or enhances the speech of the weaker group with a goal of exactly equalizing the voices would almost certainly be struck down.[99]

---

91. 435 U.S. 765 (1978).

92. *Id.* at 820-21 (White, J., dissenting).

93. *Id.* at 810 (White, J., dissenting). Justice White had argued earlier that Congress had decided "that elections are to be decided among candidates none of whom has overpowering advantage by reason of a huge campaign war chest." *Buckley*, 424 U.S. at 265 (White, J., concurring in part and dissenting in part). Justice White believed that expenditure ceilings were a permissible means of achieving this "acceptable purpose" so long as they were not "plainly too low." *Id.* at 265-66.

94. 435 U.S. at 810-11 (White, J., dissenting).

95. The Court found that "there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts." *Id.* at 789. Perhaps the majority's best evidence on this point was that the voters rejected the proposal in 1976 even though the corporations which opposed it were enjoined from contributing or expending any money against it. *Id.* at 789 n.28.

96. *See* Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 599-600 (1980).

97. *Id.* at 600.

98. This would avoid the restriction on the quantity of speech which the Court found impermissible in *Buckley*. *See* 424 U.S. at 44-51. Public financing of candidates does not "abridge, restrict, or censor speech, but . . . use[s] public money to facilitate and enlarge public discussion." *Id.* at 92-93. *But see* Shiffrin, *supra* note 96, at 627 (criticizing the reasoning in *Buckley* and asserting that a subsidy to the less affluent candidate is no less objectionable on first amendment grounds than a restriction on the more affluent one).

99. *Cf.* Powe, *Mass Speech and the Newer First Amendment*, 1982 SUP. CT. REV. 243,

As a practical matter, equality of campaign funding cannot be achieved without closing the independent expenditure loophole.[100] Independent expenditures by PACs supporting Reagan in 1980 destroyed the apparent equality of funding.[101] Up to now, independent expenditures by PACs have played a relatively minor role. Only PACs unconnected with other organizations have engaged in significant independent spending. If the corporate, trade association, and labor PACs decide to make large independent expenditures to avoid the $5,000 limit on contributions to candidates, the amounts spent supporting candidates for the House and Senate will increase astronomically.[102]

So far, natural restraints have discouraged connected PACs from using independent expenditures.[103] New constraints of campaign finance law are likely to encourage or force connected PACs or their sponsoring organizations to make independent expenditures.[104]

B. *Lack of Accountability*

1. *Responsibility of Candidates for Campaign Contributions*

"A group like ours could lie through its teeth and the candidate

279 ("The current crop of Justices do not find leveling off their affluent peers to be a particularly attractive idea. It is not that they love the First Amendment more; they simply love egalitarianism less.").

Justice Burger has opposed expansion of access to the media because it would be "so heavily weighted in favor of the financially affluent." CBS v. Democratic Nat'l Comm., 412 U.S. 94, 123 (1973). However, Powe interprets the *CBS* decision as only resolving a conflict between "one type of wealth (broadcasters) versus another type of wealth (those who could afford to buy time)." Powe, *supra*, at 275 n.104.

100. *See* Fleishman, *The 1974 Federal Election Campaign Act Amendments: The Shortcomings of Good Intentions*, 1975 DUKE L.J., 851, 880-82. Fleishman correctly forecast the problems with regulating independent, anticandidate expenditures. *Id.* at 881. He also felt that a limit on independent spending by individuals, even if constitutional, would not equalize campaign finances because it would not control the number of individuals who might choose to spend the limit. *Id.* at 880. Finally, he saw no way to control issue campaigns. *Id.* at 881-82. Committees could run campaigns emphasizing issues with or without mentioning candidates and have a substantial impact on elections without being subject to any constitutional limits. *Id.* Interestingly, some of the largest PACs have used emotional issues to raise money which they then use for legally unlimited anticandidate expenditures.

101. The Court approvingly noted in *Buckley* that acceptance of an expenditure ceiling was a quid pro quo for public funding, and that candidates who elected not to take the public funds were not subject to an expenditure limit. 424 U.S. at 95, 107-08.

102. Of the top ten PACs with respect to independent expenditures in 1982, seven were unconnected and three were trade association PACs. None of the corporate or labor PACs were among the top ten independent spenders. *See supra* note 61.

103. *See infra* notes 182-87 and accompanying text.

104. *See infra* notes 144-65 and accompanying text.

it helps stays clean,"[105] according to Terry Dolan, Chairman of NCPAC, by far the largest independent spender among the PACs.[106] Dolan's statement reinforces liberal fears that organizations such as NCPAC will use unfair and deceptive campaign tactics to defeat Democrats while their Republican opponents escape responsibility for the tactics.

A candidate who spends campaign funds to attack an opponent is concerned about possible backlash if voters perceive the attack as unfair. Until recently, Dolan and his adversaries felt that the candidate helped by negative independent spending could remain aloof and bear no responsibility for the attacks on his opponent.

In 1982, Senator Paul Sarbanes, a liberal Democrat from Maryland, handily defeated Lawrence Hogan despite a massive negative campaign by NCPAC.[107] That campaign demonstrated that Dolan's assessment was incorrect. NCPAC's strategy hurt Hogan, whom it supported, because of popular backlash and because the negative campaign made it easier for Sarbanes to raise money from supporters.[108] Hogan eventually denounced NCPAC[109] after Sarbanes had made its support a major issue in the campaign.

The Sarbanes race illustrates that an independent spender cannot be controlled by its intended beneficiary. In some ways the intended beneficiary is in a worse position than the victim. Besides using tactics which may give the victim a campaign issue, the independent spending PAC may articulate and emphasize issues which the intended beneficiary wants to downplay or duck. To maintain its independent position, the PAC could not discuss strategy with the intended beneficiary or even respond to calls or letters urging restraint. If the candidate urged the PAC to change its strategy by making a public statement, he would risk alienating some of his ardent individual supporters.

Victims of such attacks are not without weapons. The requirement that independent expenditures be disclosed[110] makes it possible for a candidate like Sarbanes to make PAC spending an issue and to link it with his opponent.

---

105. *Running with the PACs*, TIME, Oct. 25, 1982, at 20, 22.

106. In 1981-82, NCPAC spent nearly $3.2 million, over half of the total independent spending and eight times as much as the second largest spender, Fund For a Conservative Majority. *See Independent Spending Increases*, *supra* note 61, at 8.

107. *See supra* notes 81-82 and accompanying text.

108. *See Running With the PACs*, *supra* note 105, at 26.

109. *Id.*

110. 2 U.S.C. § 434(b)(4)(H)(iii) (1982).

Incumbent victims of PAC negative spending may take other defensive actions. In a 1982 complaint filed with the Federal Communications Commission, NCPAC alleged that some of its intended victims, incumbent Senators and Representatives, had used their influence to discourage broadcasters from airing NCPAC advertisements.[111] While NCPAC presented evidence that its targets had influenced broadcasters to deny it access, NCPAC could identify no

111. NCPAC first filed a complaint against some candidates and their supporters, alleging attempts to intimidate broadcasters into refusing broadcast access to NCPAC. A few months later, NCPAC filed another complaint, alleging denial of access by several broadcast stations. National Conservative Political Action Comm., 89 F.C.C.2d 626 (1982).

The FCC concluded that NCPAC had no right of access to the media to broadcast its views. *Id.* at 627-29. The Commission cited CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973), in which the Supreme Court held that broadcasters were not required to accept paid editorial advertisements. In that case, the Court concluded that the FCC was justified in its conclusion that "the public interest in having access to the marketplace of 'ideas and experiences' would scarcely be served" by ordering a right of access to advertising time. *Id.* at 123. Such a right, the Court feared, would mean that "the views of the affluent could well prevail over those of others, since they would have it within their power to purchase time more frequently." *Id.*

Having failed to get relief from the FCC, NCPAC filed an action in federal district court. National Conservative Political Action Comm. v. Kennedy, 563 F. Supp. 622 (D.D.C. 1983). The court dismissed NCPAC's suit against Senator Kennedy and others for failure to state a claim upon which relief may be granted. *Id.* at 623. That decision had the effect of upholding the earlier decision by the FCC with respect to the nonexistence of a right of access to the media.

The court disposed of NCPAC's claim that several defendant members of Congress had intimidated broadcasters. The court found that the communications the members had with the broadcasters did not give rise to any actionable claim. Some of the defendants had allegedly "advised [the broadcasters] not to accept the NCPAC advertisements" and others had written memoranda to achieve the same result or "used the power and prestige of their federal offices to cause the stations to refuse the advertisements." *Id.* at 625.

NCPAC did not allege that the members had threatened any sort of retribution if the broadcasters did carry the advertisements. *Id.* The court also observed that the members had no executive powers to accomplish such retribution. *Id.* The warnings to the broadcasters concerning potential legal action for defamation did not involve any threatened misuse of official power. *Id.*

Despite the usual rules permitting alternative pleading, the court found the allegation that the broadcasters and the members joined in a conspiracy to deny them air time to be inconsistent with the allegation that the members intimidated the broadcasters. *Id.* The court concluded that "the statements that the defendant Members of Congress are alleged to have made to the broadcasters are functionally indistinguishable from statements that any person could have made to the broadcasters under the protections of the first amendment." *Id.* NCPAC suffered no constitutional harm and, according to the court, failed to show the necessary governmental action upon which to base a claim under the first and fifth amendments. *Id.* at 626.

Though NCPAC may have had a basis for its assertions that the members of Congress pressured the broadcasters into refusing the advertisements, NCPAC failed to find a viable remedy to protect itself against such conduct. Perhaps it was not unfair pressure but simply the broadcasters' exercise of good judgment, which the first amendment protects, that prevented NCPAC from placing the advertisements.

federal right infringed by the alleged intimidation.[112] Moreover, NCPAC lost its claim to a right of access to the broadcast media to air its views.[113]

The rise of independent spending by PACs threatens candidates with loss of control over their campaigns. If the connected PACs or their union and corporate sponsors begin to use this tactic aggressively, independent spending for media advertising could dwarf candidate spending. That could distort the messages voters receive about the qualifications and positions of candidates since candidates' presentations of themselves and their ideas will not be able to overcome PAC static.

2. *Responsiveness to Constituents and Party*

The PAC phenomenon makes politicians less accountable to their constituents and political parties. National fundraising by PACs allows a candidate to finance a campaign without much local financial support. A candidate may find it necessary to take positions on issues of interest to the PACs whose favor he seeks rather than on issues of most concern to his constituents.[114]

Political parties can provide only a small portion of the necessary funds for a congressional race.[115] Large PAC contributions further reduce candidates' incentive to seek party money.[116] Raising money by cultivating PACs, rather than wealthy constituents or

---

112. 563 F. Supp. at 624-27.

113. *See id.* at 627; *cf.* CBS v. Democratic Nat'l Comm., 412 U.S. 94, 120-21 (1973) (in declining to find that the refusal of the broadcasters to sell time to NCPAC was governmental action for the purposes of the first amendment, the Court said: "[I]t would be anomalous for us to hold, in the name of promoting the constitutional guarantees of free expression, that the day-to-day editorial decisions of broadcast licensees are subject to the kind of restraints urged by respondents.").

114. *See* Adamany, *PAC's and the Democratic Financing of Politics*, 22 ARIZ. L. REV. 569, 596 (1980); Wright, *supra* note 90, at 619-20. Of course, raising campaign money nationally was common even before the rise of the PACs. *See* D. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 39 (1974).

115. Of the total receipts of more than $76 million for Senate campaigns in 1981-82, only about $800,000 was contributed by major party organizations. 1981-1982 FEC SENATE AND HOUSE CAMPAIGNS REPORT, *supra* note 78, at 55, 64. In House campaigns in the same period, the total receipts were about $99 million while major party contributions totaled just over $2.5 million. *Id.* at 56, 66. FECA's limits on individual and party committee contributions have made PACs an alternative and effective source of funds, weakening the role of political parties. *See* Epstein, *The PAC Phenomenon: An Overview*, 22 ARIZ. L. REV. 360-61 (1980).

116. One respected political columnist has suggested "channeling much more of the money (including . . . all general election spending) through the respective party committees, rather than through individual candidates' treasuries." D. BRODER, THE PARTY'S OVER 256 (1971).

party leaders, means that campaigns will be financed largely by special interest group money because most PACs are connected with these groups.

Ideologically focused, unaffiliated PACs tend to do the most independent spending.[117] These PACs do not raise their funds from members of a trade association, stockholders of a corporation, or members of a union but from individuals who strongly support a particular issue or group of issues. The influence of interest groups, including ideologically focused PACs, is beneficial in some ways. Ideological PACs are more likely clearly to reflect the political views of their individual contributors than are PACs associated with unions, corporations, or trade associations. Contributors give to ideological PACs because they promote a few narrow political issues of particular interest to the donors.

By contrast, contributors give to union, corporate, or trade association PACs to advance the special interests of the group as perceived by the PAC managers. These PACs sometimes support candidates who are receptive to the group's special interest but whose political positions on other issues are inconsistent with the views of individual contributors. Peer pressure and subtle coercion also may induce members of a group to contribute to affiliated PACs.[118]

Legislators always have been concerned about raising campaign funds and about avoiding issues which make it easier for an opponent to raise funds.[119] Candidates who incur the wrath of special interest groups are hurt whether or not the special interest group has a PAC. For example, being identified as a member of the

117. Only three of the ten PACs that did the most independent spending in 1982 were connected with other organizations. The American Medical Association's (AMA) PAC spent about $212,000 and the Realtors PAC spent $188,000. The National Rifle Association (NRA) Political Victory Fund spent $235,000. The NRA PAC is connected to a single-issue, ideological organization rather than a trade association and is more like NCPAC and other nonconnected PACs than the AMA and Realtors' PACs. Together, the three PACs spent only about 20% of the amount spent by NCPAC ($635,000 to $3.2 million). *See supra* note 61.

118. Congressional concern about coercion of contributors by corporate and union PACs was reflected in the rules that were enacted to prevent it. *See* 2 U.S.C. § 441b(b)(3) (1982). The FEC has promulgated rules to carry out the mandate of the statute in this area. 11 C.F.R. § 114.5(a) (1984). The proscription of coercion illustrates the concern but can hardly be expected to eliminate the problem because of the subtle and unprovable sanctions which unions and corporations can impose on noncontributors.

119. *See* D. MAYHEW, *supra* note 114, at 61-73. Mayhew suggests that for most congressmen the best strategy is conservative. They should "cling to their own positions of the past when possible and . . . reach for new ones with great caution where necessary." *Id.* at 67.

"Dirty Dozen" by environmental groups could be quite damaging to a candidate even if the environmentalists had no PAC that could contribute or spend independently.[120]

It may be easier for potential candidates to appeal to PACs for contributions than to achieve the visibility necessary to spur the interest of individuals who make contributions. However, candidates cannot directly approach a PAC to seek assistance in the form of independent spending. Direct contact between the candidate and the PAC is impermissible if spending is to be classified as independent.[121] Further, the candidate who receives support from PAC independent spending must live with the required disclosure of PAC spending.[122]

Both major political parties are concerned about the accountability of independent spending, especially negative spending, by PACs.[123] However, they have made no progress toward a solution.

C. *Corruption and the Appearance of Corruption*

Prevention of corruption and the appearance of corruption is the only governmental interest which the Supreme Court has found sufficient to justify restrictions on speech in campaign financing regulation. In *Buckley v. Valeo*,[124] the Court held the risk of corruption justified limits on contributions to candidates but that

120. Mobil Oil Company has run newspaper advertisements comparing the political activities of Common Cause with those of the business PACs whose spending Common Cause would like to see regulated. *E.g.*, N.Y. Times, Jan. 12, 1984, at A31, col. 4. Mobil asserts that "[b]oth PACs and Common Cause spring from the concept that like-minded voters can be politically more effective by banding together." *Id.* Mobil attributes the interest of Common Cause's leadership in the regulation of PACs to an antibusiness bias combined with the increase in the number of business PACs. *See id.* This antibusiness bias is unstated and inconsistent with the views of many Common Cause supporters, according to Mobil. *See id.*

Environmental Action, the group which names the "Dirty Dozen" and tries to engineer their defeat in congressional elections, has done independent spending in those races rather than contributing to the favored candidates. *Vote Results Mixed on the Environment*, N.Y. Times, Nov. 7, 1976, at 35, col. 1. Ironically, in 1974 with a budget of only $30,000, the group saw 8 of its 12 targets defeated. *Id.* In 1976, only 3 of 12 targets lost despite an expenditure total of over $100,000. *Id.* The publicity generated by news stories about the campaigns of the "Dirty Dozen" probably has more impact on voters, workers, and contributors than independent spending for advertising. Environmental Action spent some of the money on organization in the districts affected rather than on advertising. *See id.* Environmental Action stopped independent spending in 1976 because of its difficulty in maintaining independence from favored candidates. H. ALEXANDER, *supra* note 8, at 398.

121. *See supra* note 2.

122. *See* 2 U.S.C. § 434(b)(6)(B) (1982).

123. *See* H. ALEXANDER, *supra* note 8, at 388.

124. 424 U.S. 1 (1976) (per curiam).

expenditures did not present such a risk.[125] In *First National Bank v. Bellotti*,[126] the Court struck down a statute barring corporate contributions in referendum elections because of the absence of a corruption risk.[127] The Court suggested that a ban on corporate contributions, or even independent expenditures by corporations, might be justified in candidate elections because of the need to prevent candidate corruption.[128]

More recently, in *California Medical Association v. Federal Election Commission*,[129] the Court upheld the $5,000 limit on contributions to multicandidate PACs. The *California Medical Association* decision was surprising because the only risk of corruption was indirect.[130] Four Justices felt that a contribution to a PAC should receive less first amendment protection than a contribution to a candidate.[131] The PAC contribution was seen as "speech by proxy," while a contribution to a candidate was the contributor's direct speech.[132] Justice Blackmun joined those four Justices in upholding the statute but rejected the "speech by proxy" theory.[133] Justice Blackmun saw potential corruption in the multicandidate PACs serving as "conduits for contributions to candidates."[134] He suggested that the $5,000 limit on contributions to PACs might be unconstitutional if applied to a PAC which did only independent spending.[135] If there is no risk of corruption involved in direct independent spending, as *Buckley* indicates, there could hardly be a corruption risk if the money is spent indirectly by contributing to a PAC which buys the air time.

After *Bellotti* and *California Medical Association*, it appears that the Court will subject political contributions to the same first amendment scrutiny as expenditures—upholding contribution limits only when there is a risk of corruption or apparent corruption of

125. *Id.* at 25-30, 45-46.

126. 435 U.S. 765 (1978).

127. *Id.* at 788-92.

128. *Id.* at 788 n.26.

129. 453 U.S. 182 (1981).

130. *Id.* at 197-99 & n.19 (plurality opinion). Justice Blackmun concurred in part of the plurality opinion by Justice Marshall and concurred in the judgment, but did not join in the plurality's first amendment analysis. *Id.* at 201-04 (Blackmun, J., concurring in part and concurring in the judgment).

131. *Id.* at 196 (plurality opinion).

132. *Id.* at 196-97 (plurality opinion).

133. *Id.* at 202 (Blackmun, J., concurring in part and concurring in the judgment).

134. *Id.* at 203 (Blackmun, J., concurring in part and concurring in the judgment).

135. *Id.*

candidates.[136] It is argued that PACs, by aggregating small contributions, can spend much more than individuals and have more influence on candidates and elections, thus at least appearing to corrupt them.[137] However, a wealthy individual such as General Motors heir Stewart Mott may buy $100,000 of air time for a favorite liberal candidate. Permitting Mott to buy that much air time, while preventing thousands of small contributors from giving to a PAC to do the same thing, unfairly favors the rich.[138]

The corruption rationale may justify limits on contributions to PACs and on contributions from PACs to candidates. It does not justify restraints on PAC independent spending. Indeed, the corruption rationale does not justify the existing prohibition of independent expenditures by corporations and labor unions.[139] Since *Bellotti*, even the prohibition of contributions by corporations and unions is constitutionally suspect. In his dissent in *Bellotti*, Justice White said that the Court had "reserve[d] the formal interment of the Corrupt Practices Act [which bars corporate and union contributions and expenditures] . . . for another day."[140] He is correct. The Court will be hard-pressed to distinguish the corruption risk posed by contributions from union or corporate treasuries or officers from that posed by contributions of up to $5,000 from the union or corporate PAC. The union or corporate officers have de facto control over contributions from all three sources,[141] but only use of treasury money is barred.

Obviously, if the risk of corruption cannot sustain a ban on contributions by unions and corporations it certainly cannot sustain the ban on independent expenditures. The Supreme Court would have

136. *See* Citizens Against Rent Control v. Berkeley, 454 U.S. 290 (1981) (striking down municipal ordinance which imposed a $250 limit on contributions to committees which supported or opposed ballot issues); Richards, *The Rise and Fall of the Contribution/Expenditure Distinction: Redefining the Acceptable Range of Campaign Finance Reforms*, 18 NEW ENG. L. REV. 367, 393 (1983). Perhaps the proxy speech theory advanced by the plurality in *California Medical Association* was just an indirect way of permitting government to attempt to equalize political voices, something a majority of the court has never endorsed. Powe, *supra* note 99, at 259-60.

137. Note, *supra* note 42, at 696-700.

138. Powe, *supra* note 99, at 267.

139. Corporations and labor unions are forbidden from making "a contribution or expenditure in connection with" a federal election. 2 U.S.C. § 441b(a) (1982). FEC regulations provide that a separate segregated fund created by a corporation or union may make independent expenditures but that the corporation or union itself may not. 11 C.F.R. § 109.1(a), (b)(1), (c) (1984).

140. 435 U.S. at 821 (White, J., dissenting).

141. *See* Nicholson, *The Constitutionality of the Federal Restrictions on Corporate and Union Campaign Contributions and Expenditures*, 65 CORNELL L. REV. 945, 993 (1980).

to repudiate past statements about corruption risks or develop a new rationale to uphold the prohibition on independent expenditures.[142] The Court already has rejected the need to protect dissident union members or shareholders against the use of union or corporate treasury funds to support candidates whom they oppose.[143] It is likely, then, that the PACs and their sponsoring organizations can by independent expenditures continue to circumvent ill-conceived restrictions on direct participation by unions and corporations in the political process.

III. THE PROBLEMS WITH "REFORM" PROPOSALS

A. *"Reforms" That Could Stimulate Independent Spending*

Proposals to curb the power of PACs usually include public financing for House and Senate campaigns,[144] and accompanying limits on candidate expenditures in those campaigns.[145] Others would limit campaign spending indirectly: one recently introduced bill would give favorable tax treatment to contributors to candidates

142. *See, e.g.*, 1 T. SCHWARZ & A. STRAUS, FEDERAL REGULATION OF CAMPAIGN FINANCE AND POLITICAL ACTIVITY § 2.06(1) (1984); Birnbaum, *The Constitutionality of the Federal Corrupt Practices Act After* First National Bank of Boston v. Bellotti, 28 AM. U.L. REV. 149, 172-74 (1979); Nicholson, *supra* note 141, at 988-94.

143. *Bellotti*, 435 U.S. at 794-95.

The remedies for aggrieved shareholders may be more theoretical than real. *See* Nicholson, *supra* note 141, at 961 n.72 and sources cited therein. Of course, if corporations begin to do large amounts of political spending, the attitudes of shareholders and the courts could change dramatically.

As for union members' rights, see Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); Comment, *The Regulation of Union Political Activity: Majority and Minority Rights and Remedies*, 126 U. PA. L. REV. 386 (1977). In *Abood*, the Court concluded that if a union spends "for the expression of political views, on behalf of political candidates, or toward the advancement of ideological causes not germane to its duties as collective-bargaining representative," it must finance such expenditures "from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so . . . by the threat of loss of governmental employment." 431 U.S. at 235-36. The plaintiffs alleged that the union made political expenditures from service fees. Nonmembers of the union must pay service fees if they are represented by the union in collective bargaining. The Court ruled that if the plaintiffs established the facts alleged upon remand to the trial court, the court could order restitution of the portion of the compulsory charges used for political purposes to which they objected and a reduction in future charges by that percentage. *Id.* at 240.

144. *E.g.*, H.R. 2490, 98th Cong., 1st Sess., 129 CONG. REC. H1992 (daily ed. Apr. 12, 1983) (public financing of general elections for House); S. 85, 98th Cong., 1st Sess., 129 CONG. REC. S91 (daily ed. Jan. 26, 1983) (public financing of general elections for Senate); E. DREW, *supra* note 49, at 147-56 (public financing of general elections for both houses of Congress).

145. *E.g.*, H.R. 2490, *supra* note 144, § 7; S. 85, *supra* note 144, § 3.

who agree in advance to limit expenditures.[146]

Restrictions on PAC contributions also could curtail PAC power. Some proposals do not reduce the limit on a PAC contribution to a candidate but instead reduce the total amount a candidate could accept from all multicandidate PACs in a particular campaign.[147] These proposed reforms are unlikely to reduce the PAC money spent on Senate and House races since PACs can easily evade the limits by making independent expenditures.

Restrictions imposed by the federal campaign law motivated the substantial independent expenditures of pro-Reagan PACs in the 1980 election. First, contributions to Reagan and Carter for the general election were illegal,[148] but many people wished to contribute. Second, by accepting public funding, Reagan agreed to a spending limit that was unrealistically low[149] for a challenge to an incumbent president.[150] Reagan supporters created PACs to collect contributions and use the money independently to support the Reagan candidacy. However, the PACs raised less than they expected.[151] Many individuals who supported Reagan may have declined to contribute to the PACs because the campaign received public funds. Further, the uncertain legality of independent spend-

146. H.R. 4428, 98th Cong., 1st Sess. §§ 2-3, 129 CONG. REC. H10,056 (daily ed. Nov. 16, 1983). The bill provides for a $100 tax credit ($200 for a joint return) for a contribution to a "qualified" candidate (one who agrees to spending limits) for the House of Representatives, and a $200 total tax credit ($400 for a joint return) for all contributions to qualified candidates.

147. *E.g.*, H.R. 4428, *supra* note 146, § 7; H.R. 2959, 98th Cong., 1st Sess. § 4, 129 CONG. REC. H2784 (daily ed. May 10, 1983); H.R. 2490, *supra* note 144, § 6.

148. 26 U.S.C. § 9012(b) (1982).

149. Both candidates for president in 1972, the last privately financed general election, spent far more than the amount the candidates were permitted to spend in 1980. Nixon spent $61 million while McGovern spent $30 million. H. ALEXANDER, *supra* note 70, at 104. Eight years of inflation later, the 1980 spending limit was only slightly over $29 million. *See supra* note 10.

150.

> If incumbents and challengers are both held to the same dollar limitations . . . challengers will inevitably be disadvantaged by the incumbents' pre-existing name recognition, campaign organization, media access, and the publicly provided staff, services, and supplies available to all office-holders. . . . Moreover, because high expenditures constitute the principal means of attack on incumbents by challengers, the lower the expenditure ceilings, the greater the amount of discrimination.

Fleishman, *supra* note 100, at 878-79. *Cf.* Jacobson, *The Effects of Campaign Spending in Congressional Elections*, 72 AM. POL. SCI. REV. 469, 489 (1978) (concluding that "any reform measure which decreases spending by the candidates will favor incumbents").

An important consequence of inadequate funding is that the candidates concentrate on media advertising and ignore field operations and other activities which reach voters directly. This may contribute to voter apathy and low voter turnouts. H. ALEXANDER, *supra* note 70, at 104 (commenting on the inadequacy of funding for the 1976 presidential general election).

151. H. ALEXANDER, *supra* note 8, at 316-19; Note, *supra* note 42, at 687.

ing hampered the PACs' efforts.[152] This uncertainty led the Carter campaign actively to discourage independent spending for fear it would count toward Carter's spending limit.[153] Despite raising less than expected, PACs increased media exposure for candidate Reagan far beyond the level that would have been reached with public funds alone.[154]

Congress apparently recognized the inadequacy of the public funding scheme for presidential elections. Rather than increase the funding level or permit contributions in the general election, Congress created a loophole. Amendments passed in 1979 permitted the political parties to collect "soft money," funds which cannot be used directly to support federal candidates but can be used for local "party-building activities." Congress designed the amendments to allow state and local party committees to pay for voter registration and get-out-the-vote activities as well as campaign materials supportive of the party's whole slate.[155] These activities inevitably benefit federal candidates.[156] The Reagan campaign's exploitation of soft money enlarged the loophole until it was "big enough to drive a President through."[157]

The loophole allows corporate and union treasury funds and individual contributions exceeding the federal contribution limit to be given to state and local party organizations. As a result, corporations and unions gravitate to party organizations in states where their contributions are legal.[158] These contributions are not subject to federal disclosure rules because the contributor gives the money to a state or local party committee. Federal limits and disclosure rules apply only to the portion of the committee's funds allocated to federal candidates. The committee must have enough contributions in conformity with federal law to cover that portion of its expenditures.[159]

Democrats thought this change would help unions and their candidates. However, they were wrong again. Republicans quickly perfected methods of steering national contributions to states where

152. H. ALEXANDER, *supra* note 8, at 316.

153. *Id.* at 338.

154. *See supra* notes 8-10 and accompanying text.

155. 2 U.S.C. § 431(8)(B)(v), (x), (xii), 431(9)(B)(iv), (vii), (ix) (1982). For a very helpful discussion of these provisions, see 1 T. SCHWARZ & A. STRAUS, *supra* note 142, § 5.04.

156. E. DREW, *supra* note 49, at 101-02.

157. *Id.* at 99.

158. *Id.* at 104.

159. 1 T. SCHWARZ & A. STRAUS, *supra* note 142, § 5.04.

they were legal and needed.[160] State and local committees spent $15 million to help Reagan. The Republican National Committee raised nearly $9 million and steered it to the state and local groups.[161] The Democratic National Committee was much less successful. Of $4 million spent to help Carter, only $1.3 million was raised nationally.[162]

Soft money played a prominent and poorly disclosed role in the 1984 election,[163] overshadowing independent spending by PACs and further damaging the public financing scheme for presidential elections. The success of soft money drives indicates that much private money will be contributed to presidential campaigns whether or not direct contributions are permitted.

Similarly, if a public funding law imposes expenditure limits on House and Senate races, independent spending PACs will evade the limits in at least some campaigns. Evasion is more likely if the expenditure limits are unrealistically low. It may, however, be more difficult for large national PACs to raise and spend money in Senate and House races. These races focus more on local issues and require a more localized approach to fundraising.

Restrictive contribution limits and public financing could lead corporations and labor unions to use treasury funds for independent expenditures to support candidates. To preserve their influence, corporations and labor unions might return to under-the-table contributions[164] or attack the constitutionally suspect rules that bar their independent expenditures.[165]

Such reforms would not eliminate PAC influence, but instead

160. E. DREW, *supra* note 49, at 102-05.

161. H. ALEXANDER, *supra* note 8, at 301-02.

162. *Id.* at 327. However, Carter did benefit from about five times as much spending as Reagan in communication costs. That category covers spending by corporations and unions to urge their shareholders and members to support candidates. Unions did much more of this sort of spending than businesses. Alexander, *The Regulation and Funding of Presidential Elections*, 1 J.L. & POL. 43, 57-58 (1983).

163. *See Fat Cats: Election Laws Change Campaign Role of Rich But Don't Diminish It*, Wall St. J., Oct. 24, 1984, at 1, col. 1.

164. Illegal corporate contributions were prominent in the Watergate scandal and many of them were apparently coerced by persons working for the Nixon campaign. *See* H. ALEXANDER, FINANCING POLITICS: MONEY, ELECTIONS, AND POLITICAL REFORM 112-26 (1st ed. 1976); Nicholson, *supra* note 141, at 993 n.205. Professor Winter observes that "the outlawing of contributions now lawful [by prohibiting all contributions to presidential candidates] seems a peculiar way of reducing contributions now unlawful—unless it is believed that federal subsidies will eliminate the temptation to solicit corporate contributions." R. WINTER, WATERGATE AND THE LAW 16 (1974).

165. *See supra* notes 139-43 and accompanying text.

would stimulate independent spending by PACs and other participants in the political process.

B. *Creating a Right to Reply to Negative Advertising*

A candidate whose record, qualifications, or positions on issues are challenged by his opponent may assert a right to respond.[166] However, a candidate may not respond to a media campaign by an independent spender, unless the campaign attacks his personal integrity or character.[167] Consequently, some have suggested a mechanism to give a candidate the opportunity to respond to an independent spending campaign. Such a response could be provided in several ways. First, the candidate could be given a right to buy media space or air time using his available funds. Second, the candidate could be given free space or air time by the medium used by the independent spender. Finally, the candidate could be given public funds to pay for the response.

Each of these alternatives has serious defects. A statute giving federal candidates a right to reasonable access to air time has been upheld as a constitutional balancing of first amendment rights of broadcasters and candidates.[168] However, the Supreme Court has rejected arguments that the first amendment requires a specific right

166. The equal time doctrine requires stations to allow equal opportunities for the use of the broadcast medium to all legally qualified candidates for the same office. 47 U.S.C. § 315 (1982); W. FRANCOIS, MASS MEDIA LAW AND REGULATION 580-81 (1982). Under a 1970 decision known as the *Zapple* rule, the equal time principle was extended to require a station which allows the authorized spokesmen of one candidate to use the station to allow equal time to the spokesmen of the opposing candidate. *In re* Nicholas Zapple, 23 F.C.C.2d 707 (1970) (reaffirmed in *In re* Complaints of Comm. for Fair Broadcasting of Controversial Issues, 25 F.C.C.2d 283 (1970)). Unless the equal time rule or the *Zapple* rule applies, the more general fairness doctrine controls access to the media. It requires stations to devote a reasonable amount of time to controversial public issues and to allow opportunities for airing contrasting views, but grants no specific right to respond to any particular broadcast. *See* The Fairness Report, 48 F.C.C.2d 1 (1974); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969); W. FRANCOIS, *supra*, at 593-96.

167. To implement the fairness doctrine, the FCC promulgated personal attack and political editorializing rules. These rules require a licensee to allow a candidate to respond over the station's facilities if his character or integrity is attacked by someone other than the opposing candidate (or his authorized spokesmen), 47 C.F.R. §§ 73.1910, 73.1920 (1983), or by a station editorial, 47 C.F.R. §§ 73.1910, 73.1930 (1983). W. FRANCOIS, *supra* note 166, at 596-99. This is the only FCC rule providing for a response to an independent spender.

The FCC is now considering repeal of the rules on personal attacks and political editorializing and of the fairness doctrine itself. *See* 48 Fed. Reg. 28,295 (1983) (to be codified at 47 C.F.R. pt. 73) (proposed June 21, 1983); 49 Fed. Reg. 20,317 (1984) (to be codified at 47 C.F.R. pt. 73) (proposed May 14, 1984).

168. The FCC has the power to revoke a station license or construction permit "for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable

of access or right to respond because of the first amendment rights of broadcasters[169] and the printed press.[170]

A specific statutory right for a candidate to respond in the broadcast media to an independent spender might be upheld. Such a right to reply would not be asserted as frequently as a general right of access and would be less of a burden.[171]

Even if a right to respond existed, funds might not be available to counter the advertising done by the independent spender. The second alternative would require the print medium or broadcaster to provide free space or air time,[172] and is even more suspect under

---

amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." 47 U.S.C. § 312(a)(7) (1982).

The Supreme Court upheld this "reasonable access" requirement against a constitutional challenge by the networks. CBS v. FCC, 453 U.S. 367 (1981). The FCC received a complaint from the Carter-Mondale Presidential Committee concerning the refusal of all three networks to sell the committee air time for a 30-minute program. *Id.* at 367. The FCC ruled that the networks had violated their obligation to provide reasonable access and "directed the networks to state, by a certain date, how they intended to fulfill that statutory obligation." *Id.* at 368. The Supreme Court affirmed the FCC order. The Court held that the statute clearly provided an enforceable right of "reasonable access" for individual candidates. *Id.* at 377-86. The Court concluded that the FCC had not abused its discretion by deciding that the networks had violated their obligation to provide reasonable access. *Id.* at 394. The Court also rejected the broadcasters' argument that their first amendment rights were infringed by the statute as implemented by the FCC. *Id.* The Court held that "the statutory right of access, as defined by the Commission and applied in these cases, properly balances the First Amendment rights of federal candidates, the public, and broadcasters." *Id.* at 397.

169. Indeed, in *CBS v. FCC*, the Court emphasized that under 42 U.S.C. § 312(a)(7) (1982) broadcasters make the specific decisions about what to broadcast. The FCC's role is only to judge whether they have "considered the relevant factors in good faith." 453 U.S. at 396. In *CBS v. Democratic Nat'l Comm.*, the Court considered the right of access issue and concluded that neither the first amendment nor the Federal Communications Act required broadcasters to accept paid editorial advertisements even though they accepted commercial advertisements. 412 U.S. 94 (1973). The FCC had refused to require the licensee to change its policy with respect to editorial advertisements and simply allowed the licensee "broad discretion to decide how . . . [its] obligation [to provide balanced coverage of issues and events] will be met." *Id.* at 118-19. The Court did not reach the question whether the first amendment or the Act might bar the FCC from requiring licensees to reconsider the policy of refusing editorial advertisements. *Id.* at 119.

The Court's 1981 decision in *CBS v. FCC*, however, upheld the statutory right of "reasonable access" for candidates seeking federal elective offices, indicating support for a limited right of reasonable access to the broadcast media. The issue now is the distance Congress and the FCC can go to require broadcasters to provide access.

170. In Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), the Court struck down a Florida "right to reply" statute which required a newspaper to give a political candidate equal space to reply to critical comments about his character or record. The Court concluded that the first amendment barred the governmental intrusion into the editorial process which was required by the statute. *Id.* at 256-58.

171. Note, *Making Campaign Finance Law Enforceable*, *supra* note 54, at 393.

172. The clean campaign bill introduced by Democratic Representative David R. Obey would amend the Communications Act of 1934, 47 U.S.C. § 315 (1982), to provide that if a

the first amendment because of the additional burdens it imposes on the media. This proposal would make it difficult, if not impossible, for NCPAC to buy air time. Broadcasters would avoid the obligation to provide free reply time by not carrying an independent spender's advertisement in the first place.[173]

Finally, public funding could pay for the candidate's response.[174] This alternative may avoid infringement of the media's constitutional rights if they retain discretion to accept or reject the response but raises another issue: whether a candidate attacked by an independent spending PAC just before an election will be able to convince the FEC of his right to respond and obtain funding for such a response in time to counter the PAC's assault. Legislators would have to solve these kinds of problems for public funding to be a viable method of financing the candidate's response to negative advertising. In light of the Court's approval in *Buckley v. Valeo*[175] of the public financing scheme for the presidential general elec-

---

broadcast licensee sells an independent spender air time "to support a candidate or to criticize the views, positions, actions, or qualifications of a candidate," the licensee must provide equal time without charge to the candidate opposed or criticized by the independent spender. H.R. 2490, *supra* note 144, § 8. A bill amending the Federal Election Campaign Act of 1971, sponsored by Democratic Representative Lee H. Hamilton, contains a similar provision. H.R. 2959, *supra* note 147, § 10.

173. If broadcasters chose not to sell time to independent spenders, Common Cause and liberal politicians would not be disappointed since most of the independent spending is done by conservative groups. *See supra* note 61 and accompanying text. NCPAC and the other PACs would probably be without an effective remedy. *See supra* note 111 and accompanying text. The existing statutory right of "reasonable access" benefits only candidates. *See* 47 U.S.C. § 312(a)(7) (1982) (reasonable access for legally qualified candidates for federal office).

174. In addition to requiring that broadcasters provide free, equal time for replies to independent spenders, Representative Obey's bill provides that if independent expenditures "in opposition to, or on behalf of an opponent of, a candidate" total more than $5,000, the candidate is to receive public funds equal to the total of the independent expenditures. H.R. 2490, *supra* note 144, § 2. The candidate could choose to receive public funds equal to the value of the free air time itself under this bill. *Id.* § 2. Apparently, a candidate could not collect funds equal to those spent by an independent spender for air time and also choose to take the money equivalent of the free air time, since the bill provides that the payments under the first section "shall not duplicate" the payments under the second section. *Id.* A candidate may be able to take a subsidy equal to the amount spent by independent spenders (so long as the total is over $5,000) *and* use the free air time which the broadcast licensee must provide. *Id.* §§ 2, 8.

Another bill provides public funding of Senate races by matching certain contributions received by the candidates. The bill would suspend the expenditure limit and provide additional matching funds to a candidate opposed by substantial independent spending. S. 85, *supra* note 144, §§ 2-3. A candidate qualifies for the higher limit and supplemental funds if total independent expenditures in the race exceed one-third of the expenditure limit and no more than one-third of those expenditures supported that candidate. *Id.* The maximum supplemental funding is 50% of the original expenditure limit. *Id.* § 2.

175. 424 U.S. 1 (1976) (per curiam).

tion,[176] a public funding system appears to comply with the first amendment. This system, like that in *Buckley*, would not "abridge, restrict, or censor speech, but rather . . . [would] use public money to facilitate and enlarge public discussion and participation in the electoral process."[177]

However, this subsidy may be considered "government speech in support of specific candidates . . . which cannot be reconciled with the First Amendment."[178] As long as the legislation provides a subsidy without restricting or regulating the speech for which the subsidy pays, the speech arguably belongs to the candidate not the government. Still, government funds would be subsidizing speech with which many taxpayers disagree. In contrast to *Buckley*, the government would be taking a partisan political position to equalize the candidates' strength rather than providing funds to all candidates to facilitate political discussion. Moreover, providing a subsidy to a candidate attacked by an independent spender could be unfair to the other candidate, who had no control over the speech triggering the reply.

Allowing government aid to one candidate provides opportunities for those in control of the FEC to misuse their power to enhance the election prospects of their favorite candidates. The FEC is likely to protect major party candidates against attacks but is less likely to protect minor party candidates.[179]

The more discretion left to the agency administering the subsidy, the more the plan could raise problems similar to those raised by government censorship or spending limits. Giving extra money to a candidate's adversary could have an effect comparable to censorship of the candidate's message or a limit on his expenditures. These burdens will be imposed only on candidates who purportedly have benefited from independent spending by a PAC, but the PAC—not the candidate—will have chosen and communicated the

176. *Id.* at 90-108.

177. *Id.* at 92-93.

178. Shiffrin, *supra* note 96, at 602.

179. FEC membership is divided equally between the two major parties. There is no requirement that minor parties be represented. 2 U.S.C. § 437c(a)(1)-(2) (1982). Minor party leaders have often complained that the major parties have designed the campaign finance laws and other election laws to prevent minor parties from increasing their power. *See, e.g., Buckley*, 424 U.S. at 33-35, 94-104 (Senator Buckley, elected as a minor party candidate to Senate, and others complaining about discrimination against minor parties in FECA); Anderson v. Celebrezze, 103 S. Ct. 1564 (1983) (minor party presidential candidate challenging Ohio filing deadline for independent candidates and new parties).

message which triggers the subsidized reply.[180]

The potential dangers of selective funding of candidates outweigh the governmental interest in equal access to the media, an interest which finds little support among the members of the Supreme Court.[181] Furthermore, proposals that provide candidates an opportunity to respond to an independent spending campaign are impractical and of questionable constitutionality.

IV. "REFORMS" TO DISCOURAGE INDEPENDENT SPENDING BY PACS

A. *Preserving Natural Restraints to Limit Independent Spending by PACs*

Reform-minded legislators seldom anticipate the consequences of their efforts. As it became clear that the campaign finance laws of the 1970's, as modified by the Supreme Court, were ineffective to control campaign spending, legislators proposed additional "reforms."[182] Because of their effect on campaigns, it is unlikely that a Congress not controlled by either party will enact substantial changes.

Independent spending by PACs creates a difficult problem for reformers; because of current constitutional doctrine, it is nearly impossible to regulate directly. Furthermore, many of the proposed reforms could have drastic consequences, some intended and some unintended. Fortunately, few serious problems exist with the current system.

First, PACs have done little independent spending, except for the 1980 presidential campaign. Second, natural restraints have kept most PACs from making independent expenditures for or against candidates.

---

180. See *supra* notes 114-23 and accompanying text for a discussion of the problems created when a candidate loses control of his campaign.

181. This selective subsidy may be weaker constitutionally than the general funding of presidential campaigns. *See Buckley*, 424 U.S. at 248-51 (Burger, C.J., dissenting); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-4 (1978); Ziegler, *Government Speech and the Constitution: The Limits of Official Partisanship*, 21 B.C.L. REV. 578, 609 (1980). The use of tax money to subsidize partisan speech is almost indistinguishable from a union's use of dues money for speech with which union members disagree, a practice found unconstitutional in Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977). The constitutionality of this action is particularly suspect since the only government interest which can be advanced is equalizing debate.

182. *E.g.*, H.R. 4428, *supra* note 146; H.R. 2959, *supra* note 147; H.R. 2876, 98th Cong., 1st Sess., 129 CONG. REC. H2599-600 (daily ed. May 3, 1983); H.R. 2490, *supra* note 144; S. 911, 98th Cong., 1st Sess., 129 CONG. REC. S3796 (daily ed. Mar. 24, 1983); S. 85, *supra* note 144.

PACS which are not affiliated with any union, corporation, or trade association have made most of the reported independent expenditures. Connected PACs have far greater resources as a group but have used them to make contributions rather than independent expenditures.

Several factors may explain PACs' preference for contributions over independent expenditures. If PACs lack the funds to contribute the maximum $5,000 to a candidate, they have little reason to make an independent expenditure for the candidate.[183] Further, contributions are the time-honored, permissible way to reward politicians for past support and to obtain future support. A connected PAC must bear a name which identifies its related union, corporation, or trade association.[184] As a result, it is possible to identify interest groups which support various candidates by checking required disclosure reports.[185] Connected PACs want a candidate to know the source of their funds. However, both the group and the candidate may believe that disclosure of unusually heavy financial support, in the form of independent expenditures exceeding the $5,000 limit on contributions, will harm the candidate's electoral hopes. In addition, the PAC may damage its relationship with the adverse political party or irritate many of its contributors by investing too much in one candidate. By limiting its financial commitment to $5,000, the PAC does what its contributors and the politicians of both parties expect it to do and does not risk alienating either group.

As long as the PAC chooses to make only contributions, no candidate can complain of inadequate support if he receives the maximum legal contribution. If connected PACs began to make substantial independent expenditures, they would risk disappointing candidates who expect support above the $5,000 contribution limit. PACs, therefore, can rely on the contribution limit to keep all supported candidates equally happy and to stay within their campaign budgets. Moreover, PACs and their affiliated interest groups preserve the option of active and direct nonmonetary support of their favored candidates. The sponsoring organization can supply cam-

183. PACs probably wield less economic power than their opponents fear. Even the connected PACs, which may have the sponsoring organization pay some administrative costs, spend one-third of contributed funds for administration. *See* H. ALEXANDER, *supra* note 8, at 129-31.

184. 2 U.S.C. § 432(e)(5) (1982).

185. PACs are required to report by 2 U.S.C. § 434(a)(4) (1982). The candidates' committees are required to report by 2 U.S.C. § 434(a)(2) (1982) (House and Senate candidates) or 2 U.S.C. § 434(a)(3) (1982) (presidential candidates).

paign volunteers, including some with political, legal or fundraising expertise,[186] and can spend large sums directly from its treasury for political communications to members or shareholders. These communication costs are not treated as contributions or independent expenditures and are not subject to disclosure requirements as long as they are nonpartisan.[187] The independent spending PAC and its sponsor cannot engage in these activities since they need to maintain their independent status so their expenditures will not be counted as contributions.

B. *Channeling Funds Away From Independent Spending*

Restrictions on contributions to and from PACs and on candidates' spending are difficult to sustain, and may have the counterproductive effect of generating more independent expenditures.

Some proposals that avoid contribution restraints could, however, reduce or freeze the current level of PAC independent expenditures. The most obvious remedy is a substantial increase in funding and expenditure limits for the presidential elections; even after adjustment for inflation, these limits have always been too low.[188] So long as the spending limit is perceived to be inadequate, PACs will spend large amounts independently, especially if contributions to presidential candidates continue to be barred.

Another solution would be to increase all contribution limits. Ten years' inflation has drastically reduced these limits and the amounts seem insufficient to permit any serious corruption risk.[189]

---

186. While most individual campaign workers could not be compensated by the group for their service to the candidate, see 2 U.S.C. § 431(8)(A)(ii) (1982) (contribution includes payment by any person for services rendered to political committee), a PAC or its affiliated group could supply a lawyer or an accountant and pay his regular salary for time spent ensuring compliance with the federal campaign laws. *See* 2 U.S.C. § 431(8)(B)(ix)(II) (1982) (not a contribution if paid by regular employer solely for compliance purposes).

187. Partisan communications advocate support for a party or candidate. *See* 1 T. SCHWARZ & A. STRAUS, *supra* note 142, § 3.02[1][a]. They must be directed by the corporation or union only to a restricted class of people (for example, the members of the union and their families). *See id.* Nonpartisan communications may go beyond the restricted class and generally relate to voter registration or get-out-the-vote efforts or involve discussion of public issues without mention of a candidate or election. *See id.* § 3.02[1][b]. Nonpartisan communication costs are not subject to regulation or disclosure under the Federal Election Campaign Act but partisan communication costs must be disclosed to the FEC to the extent that they exceed $2,000 for one candidate in one election. *See id.* § 3.02[1][a]-[b].

188. Between 1972 and 1980, campaign spending rose 183% while prices in general rose 97%. Samuelson, *The Campaign Reform Failure*, NEW REPUBLIC, Sept. 5, 1983, at 28, 29.

189. The $5,000 maximum PAC contribution is slightly more than 2% of the average cost of a successful 1982 House campaign, $214,767. 41 CONG. Q. WEEKLY REP. 723 (1983). The average cost of a successful House campaign in 1976 was $87,240. *Id.*

The votes of a few members of Congress may be bought for a $5,000 contribution, "but probably too few to endanger the Republic."[190] If contribution limits were doubled, there would be far less incentive to make independent expenditures in House and Senate races or to contribute to PACs which do so. Continuing the $5,000 limit for multicandidate PACs may be unwise, since it steers individual contributions, subject to a $1,000 limit, through PACs.[191] PACs connected to unions, corporations, or trade associations are more likely than individuals to seek a quid pro quo because of their close relation to active lobbying organizations.[192]

Increasing or eliminating the limit on contributions to PACs would allow more independent spending. However, contributors probably still will prefer to give money directly to candidates. It is important to raise all contribution limits and to permit contributions to presidential candidates whether or not there is public financing. Reasonable contribution limits allow people to give money to candidates who control their campaigns. Reasonable limits also encourage contributors to make legal and disclosed contributions.

Under the doctrine of *Buckley* and its successors, the best way to deal with independent spending by PACs is to eliminate the incentives for contributors to give money to them and to reduce the incentives for PACs to make independent expenditures.[193] Independent spending PACs will evade expenditure limits, whether part of a public financing plan or "agreed to" by candidates. Limits on aggregate PAC contributions to candidates will be ineffective for the same reason. Sensible contribution limits and effective disclosure requirements allow candidates to get their messages to voters without being drowned out by independent spenders' advertising. Political contributors prefer to give money to candidates rather than to independent spending PACs. Reasonable limits, subject to inflation adjustment, also will help vulnerable contributors resist arm twisting by overzealous candidates and fundraisers.

190. *Id.*

191. J. ARMOR, *supra* note 14, at 5.

192. *But cf.* Nicholson, *supra* note 141, at 990-92 (it would still be possible for an individual "fat cat" to seek a quid pro quo).

193. *See* Note, *Independent Political Committees, supra* note 53, at 993 (concluding that funds should be diverted from independent committees to presidential candidates by raising spending limits and permitting contributions to candidates).

V. CONCLUSION

PACs were born of the movement to regulate campaign finance. Unwise restrictions have stimulated PAC growth and PAC use of the independent expenditure technique. So far, however, only the nonconnected PACs, particularly NCPAC, have made substantial use of the independent expenditure tactic. Current reform proposals are likely to stimulate more independent spending. Connected PACs and their corporate, union, and trade association sponsors will use independent spending to avoid unreasonable restrictions.

Unless the Supreme Court dramatically shifts its position concerning campaign finance, reformers should concentrate on increasing the limits on individual contributions, raising funding and expenditure limits in presidential campaigns, and improving the disclosure requirements. This strategy will keep political money in proper channels. Candidates will have reasonable opportunities to raise adequate funds, and contributors will give more to candidates and less to independent spending PACs. There will be less need to resort to undisclosed contributions, legal or illegal.

Reformers would be shortsighted to resort to public financing of congressional races or to maintain or reduce contribution limits. Proponents of such changes have failed to demonstrate why they are necessary or to confront their potentially harmful consequences.